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Nos. 87-1022, 87-1112

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Appellants,

-and-

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Appellant,

-against-

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

FRANK V. PONTERIO,

Intervenor-Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF APPELLANT FRANK V. PONTERIO

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QUESTION PRESENTED FOR REVIEW

Whether the combination of at-large and local members of the Board of Estimate in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local government.

THE PARTIES TO THE PROCEEDINGS BELOW

The following parties and *amici curiae* participated in the proceedings before the Court of Appeals:

(i) *Plaintiffs-Appellees:* Beverly Morris, Joy Clarke Holmes, Joanne Oplustil

(ii) *Defendants-Appellants:* THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

(iii) *Intervenor-Defendant-Appellants:* Frank V. Ponterio; Robert A. Straniere, individually and as a member of the New York State Assembly

(iv) *Amici Curiae:* John J. Marchi, John F. Banzhaf III, Staten Island League for Better Government, Citizens Union of the City of New York, Peter F. Vallone and other members of the New York City Council

The Municipal defendants and intervenor Strainere have joined in a separate, companion appeal to this Court.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated October 8, 1987, is reported at 831 F.2d 384 (A5)[1].

The decisions of the United States District Court for the Eastern District of New York, dated August 21, 1984 and November 16, 1986, are reported at 592 F.Supp. 1462 and 647 F. Supp. 1463 (A55, A119).

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1. Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix submitted with the Jurisdictional Statement. Numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix.

The trial court's rulings came upon remand from the Court of Appeals for the Second Circuit, which, in a decision dated May 16, 1983, held that the New York City Board of Estimate is subject to the one-person, one-vote principle. This decision, which reversed the initial judgment entered by the trial court, is reported at 707 F.2d 686 (A186).

The first decision of the United States District Court for the Eastern District of New York is reported at 551 F. Supp. 652 (A208).

JURISDICTION

Alleging that the composition and voting structure of the New York City Board of Estimate, as set forth in sections 61 and 62 of the New York City Charter, violates the equal protection clause of the United States Constitution, plaintiffs-appellees Morris, *et al.* sought declaratory and injunctive relief pursuant to 28 U.S.C. Sections 2201 and 2202. Appellees predicated jurisdiction in the trial court upon 28 U.S.C. Sections 1331 and 1343.

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1987 affirming the trial court's grant of plaintiffs' motion for summary judgment.

A Notice of Appeal to this Court on behalf of Intervenor-Defendant-Appellant Frank V. Ponterio was timely served and filed in the Court of Appeals for the Second Circuit on December 16, 1987. The municipal appellants and Intervenor-Defendant-Appellant Robert A. Straniere served and filed notices of appeal on October 15, 1987 and November 6, 1987 respectively.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(2) in that the Court of Appeals held a state statute to violate the United States Constitution.

CONSTITUTIONAL PROVISION AND STATE STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Charter:

Section 61: *Membership.* The mayor, the comptroller, the president of the Council, and the presidents of the boroughs shall constitute the board of estimate.

Section 62: *Voting in the board.*

a. As members of the board of estimate, the mayor, the comptroller and the president of the council shall each be entitled to cast two votes, and the president of each borough shall be entitled to cast one vote.

b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majori-

ty of the whole number of votes authorized to be cast by all the members of the board.

c. No resolution or amendment of any resolution shall be passed at the same meeting of the board at which it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public. Prior to a final vote by the board on any resolution or amendment of any resolution members of the general public shall be afforded the opportunity to be heard on such resolution or amendment.

d. A quorum of the board shall consist of a sufficient number of members thereof to cast six votes, including at least two of the members authorized to cast two votes each.

ARGUMENT

Appellees appear determined to misrepresent the record in this case. Once again, in response to Ponterio's argument that summary judgment was improperly granted and affirmed, Appellees assert that Ponterio agreed by stipulation to proceed in the District Court without a hearing on methodology issues (Appellees' Brief at p. 16, n. 38). As previously noted in Ponterio's brief opposing Appellees' motion to affirm, that stipulation concerned only the justification phase of the proceeding, not the methodology phase. Moreover, Appellees' argument is absurd on its face. The stipulation is dated February 13, 1985 (JA 403), six months after the District Court surprised all parties by issuing its Memorandum and Order adopting the unmodified *Abate* methodology and foreclosing any opportunity for testimony on methodology issues (A640).

POINT I

APPELLEES' CRITICISM OF THE DISTRICT VOTING POWER METHODOLOGY IS BASELESS

Appellees are in a quandary with regard to their approach to district voting power analyses. It was they who first suggested that such analyses be applied to the Board and admitted that district voting power apportionment is an acceptable means of implementing constitutional one person, one vote principles (A842, 847). That admission was made at a time when Appellees were misguided by the erroneous calculations of their expert, Brams, into believing that a district voting power analysis of the Board showed an excessive deviation and thus bolstered their *Abate*-analysis conclusions. Now that Ponterio's correct district voting power analyses show a markedly smaller and, Ponterio contends, a constitutionally acceptable deviation, Appellees have changed their tune. They now argue that the apportionment method applied to 24 of New York State County boards of supervisors is inapplicable to the Board of Estimate because while City government is large it is not regional (Appellee's Brief at p. 9). To support this exercise in casuistry Appellees also attempt to infuse the argument with "facts" concerning the importance of boroughs that are unsupported by any competent testimony in the record (Appellees' Brief at pp. 8-10).

Next, Appellees attempt to misrepresent the methodology of district voting power analysis so as to inflate the deviations for the Board as currently configured. District voting power deviations, as computed in the 24 New York State counties employing this apportionment method and, as approved by the Second Circuit and left undisturbed by this Court in the Nassau County cases, is

simly the difference between a district's voting power (expressed as a percent of total voting power) and that district's relative population (expressed as a percent of total population). See, *Iannucci v. Board of Supervisors,* 20 N.Y. 2d 244 (1967), *League of Women Voters v. Nassau County Board of Supervisors,* 737F. 2d 155 (2d Cir. 1984), and *Franklin v. Krause,* 32 N.Y.2d 234 (1973) *appeal dismissed,* 415 U.S. 904 (1974). Appellees instead compute deviations by expressing this difference as a percent of the normal or ideal district voting power i.e., as a percent difference of percent differences (Appellees' Brief at p. 24, n. 45). Thus the true deviations of - 5.02% for Brooklyn and + 6.53% for Staten Island (Simple majority-vote case for the full Board) become $\frac{-5.02}{13.72}$ x 100% = -36.59% and $\frac{+6.53}{2.17}$ x 100% = 300.92%. The maximum deviation consequently grows from 11.55% to 337.51%. This is pure sophistry. Appearing as in expert for defendants in *League*, another of Appellees' experts, Lee Papayanapoulos, defined the methodology as Ponterio applied it not as Appellees now argue (A946). Furthermore, Appellees' computation method was proposed in *League* and explicitly rejected by the Second Circuit. *League,* 737 F 2d at 168.

A compelling reason to reject Appellees' methodology argument may also be found by application of common sense. When computed as in the New York County cases, including *League* and *Franklin,* the voting-power deviations share a feature in common with *Abate*-analysis deviations, i.e., a given percent deviation has the same significance regardless of the relative population of the district it describes. For example, a 10% deviation from ideal for Staten Island (about 5% of the City population) would be evaluated as no more or less serious than a 10% deviation from ideal for Brooklyn (about 32% of the City population). One could make a cogent argument that

a given percent deviation should be considered as a more serious malapportionment indicator the greater the relative population it affects. It is nonsense to suggest that a given percent deviation is more serious the *fewer* people it affects. But that is precisely the consequence of applying Appellees' computation protocol. Moreover, this Court has recognized that even a substantial malapportionment may be tolerated if its overall, incremental effect is minimal, i.e., if it indicates misrepresentation of a small fraction of the total population. *Brown v. Thomson,* 462 U.S. 835 (1983).

Finally, Appellees argue that a methodology used for two decades in New York State and well understood by the State trial and appellate courts is too complicated to be understood by the Supreme Court of the United States (Appellees' Brief at p.36, n.58). Such a bizarre accusation is understandable in light of Appellees' self-contradictory arguments and their demonstrated inability to understand high-school algebra. Compare e.g. Appellees' unqualified endorsement of district voting power apportionment and the concept of critical votes (A 838-39, 345-47) with their outright rejection of them (Appellees' Brief at pp. 31-3). Of course it is the very existence of each member's critical vote that involves him in the formation of majority coalitions. Who would seek the support of a member whose vote doesn't matter? In the latest example of their lack of understanding, Appellees present an incorrect computation of citizen voting power deviation for the mayorless Board as would be determined following the City defendants' methodology (Appellees' Brief at p.24, n. 45). Appellees show a 49.36% deviation. Although the details of the calculation are not presented, the resultant deviation matches that obtained by *amici curiae* Peter F. Vallone, et al who do present the computation details (Amici Brief at

p. 14). *Amici* and Appellees err in this calculation by using the member voting powers applicable to the full Board (18.84% for city-wide members and 8.7% for borough presidents) instead of the mayorless Board. For the mayorless Board, the respective voting powers are 23.08% and 10.77%. The complete, correct computation applicable to the mayorless Board is presented in Exhibit A. The resultant deviation, previously provided by Ponterio to the Second Circuit, is 41.41%. See letters, Barbara A. Ponterio to Hon. James Oakes, Jon Newman, and Lawrence Pierce dated May 8, 1987 and May 11, 1987. (When the May 8, 1987 letter was written, Ponterio had not seen the City defendants' response and he assumed that they would submit a proper computation. They did not. That is the reason for the seeming disparity between the May 11 letter and asterisk note in the May 8 letter).

POINT II

APPELLEES'BUDGET ALLOCATION ANALYSES DO NOT SUPPORT THEIR CLAIM THAT STATEN ISLAND'S INFLUENCE ON BOARD DECISIONS IS EXCESSIVE

Appellees argue that Staten Island receives a disproportionate share of City resources, which Appellees measure as per capita allocations of certain minor budget items (Appellees' Brief at pp. 11,12). Simply put, Appellees contend that one person, one vote must translate into one person, one dollar. Nowhere in law or logic is there any basis for such an outlandish proposition. It is axiomatic that the function of local government is to meet the needs of its people, not to ensure a uniform dole of the public fisc. Appellees compound their misunderstanding by seizing upon the administrative budgets of the Borough Presidents to prove their point. To place this argument in

proper perspective it should be noted that the total of these administrative budgets is about $28 million, or about 0.1% of the total City budget of $26.5 billion. Most of this total budget is allocated to contractual obligations and salaries of City employees and is virtually beyond any control of the borough presidents. As for their argument on allocation of so-called public service programs, once again Appellees are mistaken. These budget items for the most part are for services performed by community agencies under contract to City departments (e.g., Youth Bureau, Human Resources Administration, Department for the Aging) and, with few exceptions, funding decisions are made by central city agencies, not the borough presidents. More appropriate comparisons show that Staten Island, with 5% of the City population, receives about 3% of the almost $5 billion Social Services Dept. budget, 3.8% of the $1.3 billion Police Dept. budget, and is the only borough with no City hospital. Staten Island does not complain about being short-changed on these allocations but rejoices because this disproportionality indicates that Staten Island has relatively fewer jobless, homeless, and criminals.

It is on the contention that Staten Island receives a disproportionate share of the capital budget that Appellees commit their most grievous error. Staten Island is home to only 5% of the City population but it accounts for over 20% of the City land area, is the only borough with a substantial amount of undeveloped land, and the only borough with an expanding population. Some 20-30% of its residents are not served by sanitary and storm sewer systems, and by rough count there are over 80 miles of unpaved and undeveloped public streets. By contrast, one can search high and low on Manhattan and not find a septic tank or dirt road. One might ask, how does it happen that in 90 years, Staten Island with all its alleged

excessive governmental power has remained alone among the boroughs in its lack of these basic municipal facilities? If Appellees' argument demonstrates anything it is that their understanding of City government is superficial and that Staten island, even with its equal vote, has been denied fair budget access for decades. Only after the other boroughs have been fully developed, has it finally become Staten Island's turn. In the final analysis, the best way to treat these budget figures is to ignore them. Bottom-line allocations cannot logically be used to induce anything certain about the process that produced them. Disproportionate governmental power can no more be proved by disproportionate per capita allocations alone than gerrymandering can be proved by disproportionate election results alone.

Finally, Appellees claim that Staten Island's excessive power on the Board is evidenced by the vote outcomes of the Board on the location of an incinerator plant, homeless shelters, and subsidized housing (Appellees' Brief at pp. 13, 14) Appellees' claim is based on half-truths. Incinerator plants were approved in all boroughs. The vote referred to by Appellees concerned where to build the first one. With regard to the homeless shelters, Appellees conveniently fail to note that in exchange for excluding Staten Island as a shelter site, Staten Island agreed to accept a 1,000-inmate jail, the largest on the mainland of any borough.

Moreover, Appellees again demonstrate their self-contradiction by attempting to prove their point using the very same district voting power apportionment analyses they elsewhere contend are invalid. They argue that these

vote outcomes would have been reversed if Board votes (they really mean voting powers) were apportioned according to population. Furthermore, their conclusions are mere speculation. The coalitions described would have a combined voting power of slightly more than 48.6% if voting power were apportioned with mathematical perfection. Obviously, acceptably small deviations from mathematically perfect apportionment could easily result in these coalitions having over 50% voting power. Moreover, a slight shift in the division of voting power between the city-wide and borough members could also result in these coalitions having over 50% voting power.

CONCLUSION

The decision of the Second Circuit Court of Appeals should be reversed.

September 22, 1988

Respectfully submitted,

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EXHIBIT A

CITIZEN VOTING POWER CALCULATION
(for 5-vote majority of a mayorless Board)

Note: The following member designations are used:

CW - a city-wide Board member (2 votes)

BP - a borough president (1 vote)

Decisive votes occur only in vote totals of 3,4,5, and 6. Borough Presidents have decisive votes only in vote totals of 4 and 5. City-wide members' votes are decisive in vote totals of 3,4,5, and 6.

The number of distinct groups of r members that can be formed from a total population of n members is equal to:

$$\frac{n!}{r!(n-r)!}$$

For each possible group size, the corresponding values are:

City-wide Members		Borough Presidents	
Group Size	# of Groups	Group Size	# of Groups
0	1	0	1
1	2	1	5
2	1	2	10
		3	10
		4	5
		5	1

The number of distinct groups of combinations of city-wide members and borough presidents is equal to the product of the number of groups of city-wide members and the number of groups of borough presidents. For example, for a combination of 1 city-wide member and 3 borough presidents, there are 2 x 10 or 20 distinct groups of the combination. The computations of decisive votes and resulting member voting powers are shown in Table A-1.

TABLE A-1

Vote Total	Voting Combinations	No. of Combination Groups	No. of CW Members with Decisive Votes	No. of BPs with Decisive Votes	Total of CW Decisive Votes	Total of BP Decisive Votes	Total of All Decisive Votes
3	1 CW + 1 BP	2 x 5 = 10	1	0	10	0	10
3	0 CW + 3 BP	1 x 10 = 10	2	0	20	0	20
4	2 CW + 0 BP	1 x 1 = 1	0	5	0	5	5
4	1 CW + 2 BP	2 x 10 = 20	1	3	10	60	80
4	0 CW + 4 BP	1 x 5 = 5	2	1	20	5	15
5	2 CW + 1 BP	1 x 5 = 5	2	1	20	5	15
5	1 CW + 3 BP	2 x 10 = 20	1	3	10	60	80
5	0 CW + 5 BP	1 x 1 = 1	0	5	0	5	5
6	2 CW + 2 BP	1 x 10 = 10	2	2	20	0	20
6	1 CW + 4 BP	2 x 5 = 10	1	4	10	0	10
	Totals:	92			120	140	260

Aggregate voting power of CW members $= \frac{120}{260} = 46.15\%$

Voting power of each CW member = 46.15% ÷ 2 = 23.08%

Aggregate voting power of borough presidents $= \frac{140}{260} = 53.85\%$

Voting power of each borough president = 53.85% ÷ 5 = 10.77%